

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

ELLIS THOMPSON CORPORATION

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block
A, in Market 134, Atlantic City,
New Jersey

) CC Docket No. 94-136
)
) File No. 14261-CL-P-134-A-86
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Honorable Joseph Chachkin
Administrative Law Judge

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JOINT MOTION FOR SUMMARY DECISION

Louis Gurman
Jacob Farber
Gurman, Blask and Freedman,
Chartered
1400 16th Street, N.W.
Suite 500
Washington, D.C. 20036
(202)328-8200

Stuart F. Feldstein
Richard Rubin
Fleischman and Walsh, L.L.P.
1400 16th Street, N.W.
6th Floor
Washington, D.C. 20036
(202)939-7900

Joseph Paul Weber
Terrence E. Reideler
Wireless Telecommunications
Bureau
Federal Communications
Commission
1919 M Street, N.W. Rm 644
Washington D.C. 20554
(202)418-1317

N. Robert Stoll
David A. Lokting
Steve D. Larson
Stoll Stoll Berne Lokting &
Shlachter, P.C.
209 Southwest Oak Street
Portland OR 97204
(503)227-1500
No. of Copies rec'd
1500 CCDE



TABLE OF CONTENTS

List of Exhibits	i
Summary	iii
I. Procedural Background	2
II. Summary Decision	6
III. The Facts	10
A. The Application Period	10
1. Ownership of Thompson's Application	10
2. The CMS Agreement	11
3. The Thompson/TDS Option Agreement	13
4. The Thompson/Amcell Agreements	16
B. The Regulatory and Civil Battle	21
1. <u>MSD Order</u>	22
2. <u>Bureau Order</u>	23
3. <u>Atlantic City Order</u>	24
4. TDS's Appeal	25
5. Related Civil Litigation	26
C. Construction of the System and the Licensee Period	29
1. Construction of the System and System Operations	29
2. Thompson's Control of the Atlantic City System	37
i. Use of Facilities	37
ii. Day-to-Day Operations	39
iii. Policy Decisions	44

iv.	Personnel Responsibilities	49
v.	Financial Obligations	50
vi.	Receipt of Monies and Profits	51
IV.	Analysis	54
A.	The <u>Hearing Designation Order</u> 's Concerns	54
B.	Thompson Was the Real Party-In-Interest Behind His Application	57
C.	Thompson Has Always Maintained Control of the Atlantic City System	59
1.	Use of the Facilities	59
i.	The Sharing of a Switch Does Not Affect Thompson's Actual Control of the System	59
ii.	Thompson Has Unfettered Use of All Facilities and Equipment	64
2.	Day-to-Day Operations	65
i.	The Duration of the Management Agreement Does Not Undermine Thompson's Actual Control Over Day-to-Day Operations	65
ii.	The Sharing of Office Facilities And Personnel Is In the System's Best Interest and Does Not Affect Thompson's Ability to Control Its Day-to-Day Operations	67
iii.	Thompson Maintains Actual Control Over Day-to-Day Operations	69
3.	Policy Decisions	72
i.	The Provisions of the Thompson/Amcell Indemnification Agreement Have Not Resulted In a Loss of Control Over Policy Decisions By Thompson	72

ii.	Thompson Makes All Policy Decisions Affecting the Atlantic City System	74
4.	Personnel Responsibilities	77
i.	Thompson's Use of Amcell's Wilmington Office Personnel Has Not Diminished Thompson's Control Over Personnel Matters	77
ii.	Through His Agreement With Amcell, Thompson Maintains Actual Control Over System Personnel	79
5.	Financial Obligations	80
i.	Amcell Has Not Assumed Financial Responsibility For the System	80
ii.	Thompson Negotiated the Provident Loan Independently of Amcell	83
iii.	Thompson Is Solely Responsible For the Financial Obligations of the Atlantic City System	84
6.	Receipt of Monies and Profits	85
i.	Thompson's Decision to Defer Distributing Profits Does Not Undermine His Control Over the Receipt of Monies and Profits	85
ii.	Thompson Is Solely Responsible For the Receipt of Monies and Profits	88
V.	Conclusion	89

LIST OF EXHIBITS

DEPOSITIONS

<u>Deponent</u>	<u>Date Taken</u>	<u>Tab</u>
Ray E. Dombroski Vice President of Engineering and New Technology for Comcast Cellular Communications, Inc.	04/26/95	1
Anna E. Hillman Sr. Vice President of Finance & Administration for Comcast Cellular Communications, Inc.	04/25/95	2
David A. Lokting Thompson's Attorney and Business Advisor	05/11/95	3
John Moerman General Manager - Wilmington/Atlantic City Comcast Cellular Communications, Inc.	04/26/95	4
Charles R. Moir Vice President of Amcell Operations for Comcast Cellular Communications, Inc.	04/28/95	5
Mark A. Panetta Vice President of Finance for Comcast Metrophone	04/28/95	6
Michael W. Riley Thompson's Expert Witness on Celluar Industry	05/15/95	7
Robert Barry Sauder Controller of Comcast Cellular Communications, Inc.	04/28/95	8

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Declaration of Ellis Thompson	17

SUMMARY

Ellis Thompson Corporation ("ETC"), American Cellular Network Corp., d/b/a Comcast Cellular, ("Amcell") and the Wireless Telecommunications Bureau ("WTB") request the grant of summary decision in favor of ETC on the sole issue designated for hearing in this proceeding:

[W]hether American Cellular Network Corporation [sic] is a real-party-in-interest in the application of Ellis Thompson Corporation for a cellular radio system on Frequency Block A in Atlantic City, New Jersey, and, if so, the effect thereof on Ellis Thompson's qualifications to be a Commission licensee.

ETC is the successor in interest to Ellis Thompson who won the Commission's lottery for the Atlantic City MSA in 1986. Following the grant of Thompson's construction authorization in 1988, he received Commission consent to the pro forma transfer of his authorization to ETC, a corporation in which he holds 100% of the stock, and is the sole director. ETC completed construction of the system in 1989 and has been operating the system, with Amcell as manager for the past six years. The system currently operates with eleven cells, serving well over 10,000 customers.

The Commission's Hearing Designation Order followed a remand of this case from the United States Court of Appeals for the District of Columbia Circuit reversing the Commission's prior order in this case, which had affirmed the grant of the Atlantic City authorization to Thompson and ETC. In the first of two earlier orders, the then Mobile Services Division granted the authorization, conditioned on the removal of a certain provision in an option agreement Thompson had entered into with Telephone and Data Systems, Inc. ("TDS"). In the second, the Common Carrier Bureau, in response to the Petition for Clarification or Partial Reconsideration filed by TDS asserting that Thompson had relinquished control of the system to Amcell, affirmed the Mobile Services Division's grant of the authorization. The Court reversed and remanded the

Commission's order because it believed the Commission's finding that Thompson had not relinquished control was inconsistent with the Commission's decisions in La Star Cellular Telephone Company^{1/} and Brian O'Neill.^{2/}

In designating this case for hearing following remand, the Commission expressed the concern that the totality of circumstances in the Thompson/Amcell relationship raises substantial and material questions as to whether Thompson has allowed Amcell to assume too great a degree of control over his system.

Discovery in this proceeding has been thorough and extensive. The parties have collectively produced well over 125,000 pages of documents, and thirteen individuals have been deposed. Deponents included Thompson, his attorney and business advisor David Lokting, ten present and former Amcell employees who worked with Thompson, and Michael Riley, a consultant with expertise in managing cellular radio systems. The evidence adduced makes clear that there has been no unauthorized transfer of control of Thompson's application or the Atlantic City system.

Intermountain Microwave,^{3/} lays out six guidelines for resolving transfer of control questions for common carrier licensees. The Hearing Designation Order and recent precedent make clear that those guidelines are flexible and are to be interpreted in a manner that comports with current cellular telephony. Under each of those six factors, Thompson is, and always was, the sole controlling party of his application and the Atlantic City system. The first factor is

^{1/} 9 FCC Rcd 7108 (1994).

^{2/} 6 FCC Rcd 2572 (1991).

^{3/} 24 Rad. Reg. (P & F) 983 (1963).

whether Thompson has "unfettered use" of his facilities. Commission precedent makes clear that ownership and/or unimpeded access to station facilities is tantamount to their unfettered use. Thompson owns all of the system's equipment, with the exception of the shared Amcell switch, and is the lessee of all cell sites. However, Thompson has full access to the switch and the sharing of Amcell's switch does not affect his control. Though he does not reside in Atlantic City, Thompson visits the system and inspects its facilities whenever he wishes to do so. Thus, Thompson has complete access to, and use of, the system's facilities and sites.

The second factor is whether Thompson is in control of daily operations. Michael Riles testified that the Thompson/Amcell Management Agreement is a typical turnkey management agreement and is fully consistent with Commission policy and precedent. While Amcell is responsible for the routine administration of the system's day-to-day operations, such operations are subject to Thompson's oversight and review. Thompson (1) meets and corresponds regularly with his management team; (2) has put various procedures in place to ensure he fully reviews the system's operations, including a check-signing policy which requires his signature on all checks for non-recurring expenses in excess of \$5,000, with certain limited exceptions (he has signed more than 3,000 checks); (3) reviews and approves the system's capital and operating budgets; and (4) reviews and signs all contracts relating to the system. Thus, Thompson maintains control over the system's daily operations.

The third factor is whether Thompson is responsible for system policy. While Amcell, as managing agent, frequently makes policy recommendations for the system, all such proposals require Thompson's approval before being put into effect. In fact, Thompson has frequently rejected Amcell policy initiatives. Thompson further exercises his control over system policy by

reviewing and approving (1) the system's operating and capital budgets; (2) contracts entered into by the system, including site leases and roamer agreements; (3) system pricing and marketing, including customer and roamer rate plans; (4) system engineering decisions, including the construction and modification of cells; (5) FCC applications; and (6) all litigation decisions affecting his interest in the system.

The fourth factor is whether Thompson has control over the system's personnel. Because Thompson hired Amcell to manage the system, ETC has no need for any employees other than Thompson. Thompson determines and pays his own salary. Thompson retains his control over personnel through the "oversight and review" provisions of the Management Agreement and through his ability to terminate Amcell at any time for cause. Thompson has testified that he has been very pleased with Amcell's performance. therefore, it is immaterial that the system shares personnel with Amcell's Wilmington system.

The fifth factor is whether Thompson has control over the system's finances. Thompson paid for his application himself and funded the construction of the system with an initial loan for \$1.85 million (which is now approximately \$2.9 million) which he negotiated independently of Amcell and on which his company, ETC, is the sole obligor. Amcell has never advanced the system any funds. All revenue from the system's operations is deposited in an account controlled by Thompson, and he approves all system expenses.

The sixth factor is whether Thompson receives "monies and profits" from the system's operations. While Thompson, for a variety of sound business reasons unrelated to Amcell, has opted to defer making a distribution, his decision to reinvest the system's profits to fund its expansion is itself indicative of his control over the system's monies and profits. Thompson also

receives a monthly salary of approximately \$12,000 which he alone determines. Finally, when the Oregon Court had initially invalidated TDS's option in 1992. Thompson negotiated an Exercise Agreement with Amcell concerning Amcell's contingent option. One of the provisions he negotiated factored retained earnings into the price that Amcell would pay at closing to acquire the system. Accordingly, Thompson has every incentive to maximize the system's profitability regardless of whether or not profits are distributed

The Intermountain analysis provided in this motion shows that the record in this case is markedly different from the operative facts in La Star and O'Neill, and that a different result in this case would be fully warranted. ETC, Amcell and the WTB submit that there is no material question of fact requiring an evidentiary hearing. There has been no transfer of control of Thompson's application or of the Atlantic City system, and ETC remains fully qualified to be a Commission licensee.

Accordingly, the parties respectfully request that the Presiding Judge grant summary decision and reinstate the grant of Thompson's application.

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To: Honorable Joseph Chachkin
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JOINT MOTION FOR SUMMARY DECISION

Ellis Thompson Corporation ("ETC"), American Cellular Network Corp. d/b/a Comcast Cellular ("Amcell") and the Wireless Telecommunications Bureau ("WTB"), by their respective attorneys, and pursuant to Section 1.251 of the Commission's rules,^{1/} hereby move the Presiding Judge for a summary decision in favor of ETC on the sole designated issue in the captioned proceeding. As discussed below, the prior written record and new evidence developed through discovery in this proceeding clearly demonstrate that no genuine issue of material fact is present. In support hereof, the following is respectfully shown:

^{1/} 47 C.F.R. § 1.251.

TABLE OF CONTENTS

List of Exhibits	i
Summary	iii
I. Procedural Background	2
II. Summary Decision	6
III. The Facts	10
A. The Application Period	10
1. Ownership of Thompson’s Application	10
2. The CMS Agreement	11
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ETC is the successor in interest to Ellis Thompson who won the Commission's lottery for the Atlantic City MSA in 1986. Following the grant of Thompson's construction authorization in 1988, he received Commission consent to the pro forma transfer of his authorization to ETC, a corporation in which he holds 100% of the stock, and is the sole director. ETC completed construction of the system in 1989 and has been operating the system, with Amcell as manager for the past six years. The system currently operates with eleven cells, serving well over 10,000 customers.

The Commission's Hearing Designation Order followed a remand of this case from the United States Court of Appeals for the District of Columbia Circuit reversing the Commission's prior order in this case, which had affirmed the grant of the Atlantic City authorization to Thompson and ETC. In the first of two earlier orders, the then Mobile Services Division granted the authorization, conditioned on the removal of a certain provision in an option agreement Thompson had entered into with Telephone and Data Systems, Inc. ("TDS"). In the second, the Common Carrier Bureau, in response to the Petition for Clarification or Partial Reconsideration filed by TDS asserting that Thompson had relinquished control of the system to Amcell, affirmed the Mobile Services Division's grant of the authorization. The Court reversed and remanded the

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The fifth factor is whether Thompson has control over the system's finances. Thompson paid for his application himself and funded the construction of the system with an initial loan for \$1.85 million (which is now approximately \$2.9 million) which he negotiated independently of Amcell and on which his company, ETC, is the sole obligor. Amcell has never advanced the system any funds. All revenue from the system's operations is deposited in an account controlled by Thompson, and he approves all system expenses.

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The Intermountain analysis provided in this motion shows that the record in this case is markedly different from the operative facts in La Star and O'Neill, and that a different result in this case would be fully warranted. ETC, Amcell and the WTB submit that there is no material question of fact requiring an evidentiary hearing. There has been no transfer of control of Thompson's application or of the Atlantic City system, and ETC remains fully qualified to be a Commission licensee.

Accordingly, the parties respectfully request that the Presiding Judge grant summary decision and reinstate the grant of Thompson's application.

I. PROCEDURAL BACKGROUND

1. This case was designated for hearing on November 28, 1994^{2/} to resolve the following issue:

[W]hether American Cellular Network Corporation [sic] is a real-party-in-interest in the application of Ellis Thompson Corporation for a cellular radio system on frequency Block A in Atlantic City, New Jersey, and, if so, the effect thereof on Ellis Thompson's qualifications to be a Commission licensee.^{3/}

ETC is the successor in interest to Ellis Thompson ("Thompson"), an individual who won the Commission's lottery in 1986 for the Atlantic City Metropolitan Statistical Area ("MSA") non-wireline cellular system. Thompson was ultimately awarded a construction authorization in 1988.^{4/} Following grant of the authorization, Thompson applied for and received Commission consent to the pro forma assignment of his authorization to ETC, a corporation in which he holds one hundred percent of the issued and outstanding stock and is the President and sole director.^{5/} ETC completed construction of the non-wireline Atlantic City cellular system in 1989 and has been operating the system, with a subsidiary of Amcell as the manager, for the past six years.^{6/}

^{2/} Ellis Thompson Corporation, 9 FCC Rcd 7138 (1994) ("Hearing Designation Order" or "HDO").

^{3/} HDO at 7143.

^{4/} Ellis Thompson, 3 FCC Rcd 3962 (Mobile Serv. Div. 1988) ("MSD Order").

^{5/} Public Notice, Report No. CL-89-42, released December 2, 1988.

^{6/} ETC filed a Form 489 with the Commission on June 15, 1989, notifying the Commission that the Atlantic City system had commenced operations. See File No. 02632-CL-MP-89.

2. The Commission's HDO followed a remand of this case from the United States Court of Appeals for the District of Columbia Circuit^{7/} reversing the Commission's previous order in this case,^{8/} which had affirmed the grant of the Atlantic City authorization to Thompson and ETC. In the first of two earlier orders, the then Mobile Services Division ("MSD") had granted the authorization, conditioned upon the removal of a certain provision in an option agreement that Thompson had entered into with TDS.^{9/} In the second, the Common Carrier Bureau, in response to a Petition for Clarification or Partial Reconsideration filed by TDS asserting that Thompson had relinquished control of the system to Amcell, affirmed the MSD Order's grant of the authorization.^{10/}

3. The Court reversed and remanded the Commission's Atlantic City Order because it believed the Commission's finding that Thompson had not relinquished control represented an unexplained departure from agency precedent.^{11/} In particular, the Court felt that the Commission, in its application of the pertinent licensee control criteria, failed to reconcile the result it reached in the Atlantic City Order with its decision in La Star Cellular Telephone Company,^{12/} released by the Commission on the same day.^{13/} Upon remand, the Commission

^{7/} Telephone and Data System, Inc. v. F.C.C., 19 F.3d 42 (D.C. Cir. 1994) ("TDS v. FCC").

^{8/} Ellis Thompson Corporation, 7 FCC Rcd 3932 (1992) ("Atlantic City Order").

^{9/} MSD Order at 3963.

^{10/} Ellis Thompson Corporation, 4 FCC Rcd 2599 (Com. Car. Bur. 1989) ("Bureau Order").

^{11/} TDS v. FCC at 50.

^{12/} 7 FCC Rcd 3762 (1992) ("La Star"), rev'd sub nom. Telephone and Data Systems, Inc. v. FCC, 19 F.3d 655 (D.C. Cir. 1994).

^{13/} TDS v. FCC at 50.

determined that a substantial and material question of fact exists as to whether Amcell became a real-party-in-interest behind Thompson's application.^{14/} The Commission, therefore, designated the instant proceeding for hearing.^{15/} In the HDO, the Commission set aside the grant of ETC's initial authorization and granted FTC interim operating authority pending the outcome of this proceeding.^{16/}

4. On January 27, 1995, a pre-hearing conference was held wherein discovery dates were established and, at the parties' request,^{17/} the hearing date was extended from February 28, 1995 to June 19, 1995.^{18/} Amcell, TDS, and Thompson advised the Presiding Judge that they had reached a settlement in principle of protracted civil litigation among them in a number of different fora involving the Atlantic City system.^{19/} The parties further advised the Presiding Judge that, conditioned upon the outcome of the instant proceeding, the parties' civil settlement

^{14/} HDO at 7138.

^{15/} Id. at 7143.

^{16/} HDO at 7143.

^{17/} On February 6, 1995, Ameritel, a fifth-ranked selectee in the Atlantic City non-wireline lottery, petitioned to intervene. Ameritel, Petition to Intervene, filed February 6, 1995. By an order released March 7, 1995, the Presiding Judge denied intervention, Memorandum Opinion and Order, FCC 95M-68, released March 7, 1995, and, in an order released March 24, 1995, dismissed as untimely a subsequent Response and the accompanying Motion for Leave to File Response filed by Ameritel. Order, FCC 95M-84, released March 24, 1995. Ameritel filed for review of the Presiding Judge's rulings with the Review Board. Ameritel, Appeal, filed March 27, 1995. By order released July 7, 1995, the Review Board denied Ameritel's appeal. Memorandum Opinion and Order, FCC 95R-13, released July 7, 1995.

^{18/} Pre-hearing conference Tr. 37.

^{19/} Id. at 6.